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No. 79-1970.

In the
Supreme Court of the United States.

OCTOBER TERM, 1979

VALENTINE R. CICCONE,
PETITIONER,

v.

TEXTRON, INC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondent's Supplemental Brief.

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Petitioner has filed a supplemental brief arguing that the opinion of this Court in *Mohasco Corporation* v. *Silver*, 100 S.Ct. 2486 (1980) is dispositive of the issue before the Court. Petitioner submits two bases for the contention. First, the Circuit relied on Title VII cases which have been discredited by *Mohasco* and, second, that the ADEA filing requirements being similar to the Title VII filing requirements must be interpreted in the same manner. Both contentions lack merit.

The Circuit Court opinion, *Ciccone* v. *Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980), demonstrates that primary reliance was placed on ADEA decisions of other Circuit and District Courts. The Circuit states at 1221:

> "As the Sixth Circuit has said:
>
> > 'One obtains the benefits of the extended filing period in § 626(d) (2) *only* if he is in a 'deferral state' *and* elects to use that state's mechanisms to attempt a conciliation of the grievance. . . . It is only if one uses time to let the state try its hand that he needs more time to notify the Secretary of Labor. . . . [A]ny state filing need only be within the minimum 180 days allowed for the federal filing, § 626(d) (1), in order to obtain the benefits of § 626(d) (2).'
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> *Gabriele* v. *Chrysler Corp., supra,* 573 F.2d 949, 955 (6th Cir. 1978) (emphasis in original); *see also Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 192 n.5 (3rd Cir. 1977), *cert. denied,* 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978); *Skogland* v. *Singer Company,* 403 F.Supp. 797, 803 (D.N.H. 1975); *cf. Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1231-33 (8th Cir. 1975) (Title VII)."

Petitioner's suggestion that the Circuit anchored its opinion to Title VII cases is inaccurate.[1]

In *Mohasco,* the Court indicated in note 19 that a court should not read time limitations into an act not required by the literal language, citing *Occidental Life Insurance Company* v.

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[1] [Respondent notes that the Sixth Circuit's holding was *dictum.* However, the Sixth Circuit subsequently affirmed its position. *Ewald* v. *Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183 (6th Cir. 1980), *petition for cert. filed,* 49 U.S.L.W. 3134 (U.S. Aug. 4, 1980).

EEOC, 432 U.S. 355 (1977). *Occidental* stands for the proposition that "[o]nly if the legislative history . . . provide[s] firm evidence that the [Act] cannot mean what it so clearly seems to say would there be any justification for construing it in any other way." *Id.* at 361. In *Mohasco*, the Court refused to read a time limitation into Title VII because the Title VII legislative history did not sufficiently evidence such a Congressional intent.

There is, however, substantial evidence that Congress did intend a more restrictive interpretation of the extended filing period in the ADEA than required by a literal reading of § 626(d) (2). Since Congressional intent relating to the ADEA was not reviewed in *Mohasco*, *Mohasco* cannot be dispositive of the question now before the Court.

While there are substantial similarities between the filing requirements of Title VII and the ADEA, there is a critical difference indicating that the Congressional purposes in providing an extended filing period in deferral states are different for the ADEA and Title VII. Title VII mandates sequential state and federal filings while the ADEA permits concurrent filings. Originally, Title VII required a federal filing within 90 days but also prohibited federal filing in deferral states for as long as 120 days. The Act conflicted on its face. To resolve the conflict, Congress provided claimants in deferral states an additional 120 days for federal filing so that their federal remedy would not be lost during the mandatory deferral period.

The ADEA does not mandate sequential filing. The provisions of the Act do not conflict. Unlike Title VII, no extended filing period is necessary to reconcile other provisions of the ADEA. Therefore, the Title VII legislative history is not dispositive of Congress' purposes in providing an ADEA extended filing period.

Petitioner contends the Congressional purpose in providing an ADEA extended filing period is expressed by the literal

language of the Act — a separate longer filing period for those in deferral states. A bonus. Respondent contends the Congressional purpose was only to accommodate claimants whose state filings fulfill the purposes of § 626(d) (1) — early notice to employers and agencies — and § 633(b) — first resort to local remedies. Those who substitute a state filing for the federal filing required by § 626(d) (1), thereby fulfilling the underlying Congressional purposes, are granted a grace period for their federal filing during which the state may try to resolve the matter locally.

While the legislative history relating to § 626(d) (2) is sparse, it is clear.[2] Congress did not intend a bonus but rather an accommodation for those who first pursued state remedies. Though the legislative history relating to § 626(d) (2) is not explicit as to when state filing must occur, § 626(d) (1) informs us that Congress intended that employers and the remedial agency receive 180 days notice of the alleged act of discrimination. Reviewing §§ 626(d) (1) and 626(d) (2) and their histories in *pari materia* makes it apparent that the accommodation provided by § 626(d) (2) was intended only for those who fulfilled the underlying purposes of § 626(d) (1) by means of a state filing. Such an interpretation is butressed by its consistency with Congress' intent to encourage voluntary first resort to local remedies as evidenced by § 633(b).

The legislative history of § 626(d) (2) together with the ADEA itself demonstrates that a literal reading of § 626(d) (2) is not appropriate. Unlike Title VII, there is evidence that a

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[2] For text of history, see respondent's Brief in Opposition to Petition to Writ of Certiorari, at 3 n.1.

restrictive reading of ADEA language was intended. Disposition of the controversy based on the Title VII legislative history reviewed in *Mohasco* without examination of the statutory scheme, the legislative history and the consequences of a literal reading of § 626(d) (2) of the ADEA is unwarranted.

Respectfully submitted,

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